Supreme Court of the United States.

OCTOBER TERM, 1972.

No.

BRUCE R. DESMARAIS ET AL., PETITIONERS,
v.
WACHUSETT REGIONAL SCHOOL DISTRICT ET AL.,
RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS APPEALS COURT.

The Prior Proceedings.

The petitioners seek review of the decision of the Massachusetts Appeals Court in Bruce R. Desmarais & another v. Wachusett Regional School District & another (Petitioners' Brief, p. 17) after the Supreme Judicial Court of Massachusetts denied their petition for further appellate review (Petitioners' Brief, p. 42). As the Appeals Court said, "[t]his is the second action by the plaintiffs against these defendants for the same injury arising out of the same accident." (Petitioners' Brief, p. 17). The Supreme Judicial Court of Massachusetts decided the first case on

the merits and issued a full decision. *Desmarais* v. *Wachusett Regional School District,* Mass. Adv. Sh. (1971) 1763 (Petitioners' Brief, pp. 18-21).

Statement of Facts.

This is an action of tort brought by Bruce R. Desmarais, a minor, for personal injuries, and by his father, Robert R. Desmarais, for consequential damages against the defendants, David H. Byron, a teacher in the classroom where the minor Desmarais sustained his injuries, and the Wachusett Regional School District. Both defendants' demurrers were sustained (Petitioners' Brief, pp. 39-41).

The only facts before any court in this case have been only the facts as stated in the plaintiffs' declaration (Petitioners' Brief, pp. 22-39). "The facts well pleaded and only the necessary inferences from those facts are admitted by a demurrer." *Grammenos* v. *Zolotas,* 356 Mass. 594, 597 (1970), quoting *Monach* v. *Koslowski,* 322 Mass. 466, 468.

Reasons for Denying the Writ.

No Federal Question Presented.

The question whether a state is immune from suit in its own courts is a question of state law only. So also is the further question whether the state has given its consent to be sued by its constitution or statutes. These are questions of local state law, as to which the decision of the state supreme court is controlling. No federal question is presented. *Palmer* v. *Ohio,* 248 U.S. 32 (1918); *Parden* v. *Terminal Railway of Alabama State Docks Department,* 377 U.S. 184, 194-195 (1964). See *Employees of the De-*

partment of Public Health & Welfare, Mo. v. *Department of Public Health & Welfare, Mo.* (April 18, 1973), 41 U.S.L. Week 4493, 4496.

Petitioners accept this position in their brief (Petitioners' Brief, p. 6). They correctly do not argue that sovereign immunity has been waived by legislative action, since the Supreme Judicial Court of Massachusetts, in the case of these same litigants, has expressly held that no waiver existed. *Desmarais* v. *Wachusett Regional School District*, Mass. Adv. Sh. (1971) 1763, 1765. See also *Morash & Sons, Inc.* v. *Commonwealth*, Mass. Adv. Sh. (1973) 785, 792.

Rational Basis of Sovereign Immunity as Applied to Municipalities.

Even though the question of sovereign immunity is entirely a question of state law, a well-defined rational basis for the sovereign immunity of municipalities exists. Under Massachusetts law, a regional school district has been placed in the same position as a town for the purpose of lawsuits. Massachusetts General Laws, c. 71, § 16 (*b*). *Desmarais* v. *Wachusett Regional School District.*, Mass. Adv. Sh. (1971) 1763, 1765.

A Massachusetts municipality is not liable for the tortious acts of public officers or employees working under their direction performing public duties imposed by the Legislature. *Molinari* v. *Boston*, 333 Mass. 394, 395-396. The rational basis for this position is "that there is no local control over the public officer and hence no local responsibility, since 'the doctrine *respondeat superior* does not apply to the servants of one who is acting only as a representative of the government, for the benefit of the public.' " *Morash & Sons, Inc.* v. *Commonwealth*, Mass. Adv. Sh. (1973) 785, 789, quoting *Moynihan* v. *Todd*, 188 Mass. 301, 304.

An exception lies, however, where the activity involved has an element of special corporate benefit or pecuniary profit. If it does, there may be liability; if it does not and the activity is for the common good of all, there can be no liability. *Morash & Sons, Inc.* v. *Commonwealth,* Mass. Adv. Sh. (1973), 785, 792-793. *Bolster* v. *Lawrence,* 225 Mass. 387, 390. But petitioners do not argue that public schools are operated for commercial benefit and thereby come within the exception.

Petitioners do argue that the activities of a public school and a public school teacher are not "purely governmental" (Petitioners' Brief, p. 6). But the Massachusetts Legislature has required municipalities to maintain public schools for the benefit of their citizens. G.L. c. 71, § 1. Furthermore, the Massachusetts Supreme Judicial Court has decided that school teachers are public officers. *Desmarais* v. *Wachusett Regional School District,* Mass. Adv. Sh. (1971) 1763, 1965. Indeed, even if no such legislative or judicial action had been taken, could the operation of local schools be called anything but governmental, with the huge outlays of public funds earmarked for them, with the enormous public concern and endeavor expended to conduct and improve them, and with their control primarily in the hands of publicly elected officials? Such a governmental function has long been presumed by this Court. *Brown* v. *Board of Education of Topeka,* 349 U.S. 294.

The Right to Sue for Personal Injuries is Not a Fundamental Right.

The activities to which the petitioners attempt to analogize the present case are far more "fundamental rights" than a personal injury claim. The cases relied upon by

petitioners all involve deprivation of the rights of individuals based upon their inclusion in a minority group, whether that group is based upon race, geography, economics or age. No such classification exists here. In fact, a far wider opportunity for personal injury lawsuits has recently been eliminated in Massachusetts through the passage of a statute which establishes a "no-fault" basis for recovery for persons injured in motor vehicle collisions and abrogates, to a great extent, recovery in tort for those so injured. G.L. c. 90, § 34M. This statute has specifically been held not to impair any fundamental right protected by the United States Constitution. *Pinnick* v. *Cleary*, Mass. Adv. Sh. (1971), 1129, 1139.

Right to Sue does Exist.

It should be emphasized that Massachusetts law makes only municipalities and school districts immune from suit, and not school teachers. The general rule is that public officers engaged wholly in the performance of public duties are liable only for their own acts of misfeasance in connection with ministerial matters. *Desmarais* v. *Wachusett Regional School District*, Mass. Adv. Sh. (1971), 1763, 1764-1765; *Fulgoni* v. *Johnston*, 302 Mass. 421, 423. Moreover, municipalities may purchase insurance policies to indemnify employees against loss arising from suit claims, and they are required to indemnify school department employees by reason of claims arising out of acts performed within the scope of their employment. G.L. c. 41, § 100C. *Morash & Sons, Inc.* v. *Commonwealth*, Mass. Adv. Sh. (1973), 785, 792.

Conclusion.

The petitioners have not stated a substantial federal question for review by this Court. In addition, a rational basis for the state law exists and has been expressly stated by the highest court of Massachusetts. Therefore, the petition should be denied.

Respectfully submitted,

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